United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

561

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,127

ERNEST LEE BRASWELL, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK B. SANDGROUND, ESQ.

700 Colorado Building
Washington, D. C. 20005
Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ERNEST LEE BRASWELL	:	
	:	
Appellant	:	
	:	
v.	:	APPEAL NO. 22,127
	:	
UNITED STATES OF AMERICA	:	
	:	
Appellee.	:	

ON PETITION FOR APPEAL
BRIEF FOR APPELLANT ERNEST LEE BRASWELL

I. STATEMENT OF QUESTIONS PRESENTED

1. The question is whether there is any evidence on the record to sustain appellant's conviction of assault with intent to commit robbery.

2. The question is whether, in a trial for assault with intent to commit robbery, the trial court's refusal to instruct the jury on the lesser included offense of simple assault constitutes reversible error.

This case has not been previously before the Court.

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STATUTES

IV. JURISDICTIONAL STATEMENT

This is an appeal under 28 U.S.C. §§1291 and 1915 from a conviction in the United States District Court for the District of Columbia. On June 14, 1968, appellant Ernest Lee Braswell, adjudged guilty by a jury of assault with intent to commit robbery in violation of Title 22, Section 501 of the District of Columbia Code, was sentenced to imprisonment.

V. STATEMENT OF THE CASE

A. Proceedings Below

On February 26, 1968, appellant was indicted under Title 22, §501, District of Columbia Code, for Assault with Intent to Commit Robbery. He entered a plea of not guilty and asked for a jury trial. The matter came to trial on April 22 and 23, 1968, in the United States District Court sitting with a jury. At the close of the trial, the Court instructed the jury on the elements which constitute assault with intent to commit robbery. In response to the Court's request for objections, if any, to the charge, counsel for appellant asked for an instruction on simple assault as a lesser-included offense (Tr. 140).[1/] The Court refused to

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1/ All page references herein designed "Tr. " are to pages of the Official Reporter's Transcript of the trial below on April 22 and 23, 1968.

give the requested instruction, stating that "to raise [the question of simple assault] at this stage, after the charge is completed, I think is to give it altogether too much emphasis and results in seeking a compromise verdict by the jury. . . ." (Tr. 141)

The jury found Braswell guilty of assault with intent to commit robbery and the judge subsequently sentenced him to a term of three to five years in prison. From this conviction Braswell appeals.

B. Statement of Facts

Miss Letitia McGhee testified that a man followed her after she dismounted from a bus at 14th Street and Parkwood Place, N. W. and walked home at approximately 11:00 P.M. on January 9, 1968. He told her to stop as she was inserting the key in her door (Tr. 63). He said "Hey, girl, come here." (Tr. 6, 69) He then yoked her, pulling her off the porch while holding her neck and the arm on which she carried her purse. He told her to "shut up or he would cut [her] so-and-so throat". (Tr. 68, 71) At various times thereafter during the struggle he kept repeating the words, "Hey, come here, girl," and said nothing else. (Tr. 70, 71) Miss McGhee's neighbors testified

that they heard her screams about five minutes after the initial struggle but failed to respond because they believed the assailant to be her boyfriend. (Tr. 65) Miss McGhee and her assailant struggled for fifteen minutes. (Tr. 73) She finally extricated herself and ran to a neighbor's porch. The assailant continued to walk behind her saying "Girl, come on, I am tired of your B.S." (Tr. 65, 74) When Mr. Willie Hicks, Jr., a neighbor, appeared and asked the assailant if he knew Miss McGhee, he walked away. (Tr. 73, 82, 85)

Miss McGhee testified that she lost her pocketbook during the course of the struggle. Her pocketbook ended up "laying in the street". (Tr. 75, 76) Miss Shirley Belk, a neighbor, testified that Miss McGhee had the pocketbook in her hand at the time she ran up on the Belk porch (Tr. 90). Miss McGhee testified that her purse contained $21.00 and that it did not contain $21.00 when she recovered it from the street. (Tr. 66)

Miss McGhee's sister, a cab driver, came on the scene shortly after the struggle and together the women pursued the assailant one block north on 14th Street. (Tr. 67) Upon encountering a friend named Eddie Wells, Miss McGhee shouted for him to stop the assailant (Tr. 67), who

had "attacked her". (Tr. 37) Eddie Wells stopped the assailant who offered no resistance during the 10 minutes before the police arrived. (Tr. 45-46, 48) When she arrived at the scene, Miss McGhee told Wells, "That's the man, that's the man." (Tr. 67) Wells remembers her saying that appellant was the man who attacked her. (Tr. 45)

At the same time, Officer Walter L. Adams, Jr., a member of the D. C. Police Force, responded to a police radio call for "holding one for arrest". (Tr. 24) Upon arriving on the scene, Officer Adams placed the appellant under arrest and searched him. (Tr. 25) Officer Adams found no money nor lady's purse upon the appellant. (Tr. 26) Appellant denied having grabbed or attempted to rob anyone. (Tr. 29,30,31)

The appellant testified on his own behalf. He stated that he had lived in the District a year and a half, that he was employed and that he had been at a night club on the evening of the alleged crime. (Tr. 91) He denied assaulting Miss McGhee or attempting to rob her. (Tr. 92) Two character witnesses testified that appellant's reputation for peace and good order was good. (Tr. 98,100)

On the basis of this testimony, the Court submitted

the issue to the jury, instructing them as to the law on assault with intent to commit robbery but refusing to instruct them as to the law on the lesser included offense of simple assault. The jury returned the verdict of guilty.

VI. STATEMENT OF POINTS

1. The record is devoid of any evidence supporting appellant's conviction for assault with intent to commit robbery.

2. The trial court erred in denying counsel's request for an instruction on the lesser included offense of simple assault.

VII. SUMMARY OF ARGUMENT

1. The record is totally insufficient to support appellant's conviction as charged. The only accusation in the entire record of the trial that appellant assaulted Miss McGhee with the intent to commit robbery was made by counsel for the Government in his summation to the jury. Not one witness accused appellant of the crime for which he was convicted. To the contrary, the length of the struggle between the 196 lb. assailant and his 110 lb. victim, the lack of any evidence that he tried to take her purse, and the contemporaneous exclamations of the victim identifying

appellant simply as the man who attacked her testify to the fact that appellant was charged and convicted of a crime he did not commit.

2. Because the evidence on the record supported only a finding of simple assault the trial court erred in refusing to give an instruction on the lesser included offense.

VIII. ARGUMENT

A. THE RECORD FAILS TO SHOW ANY EVIDENCE TO SUPPORT APPELLANT'S CONVICTION OF ASSAULT WITH INTENT TO COMMIT ROBBERY.

Appellant's conviction cannot be sustained by the evidence adduced at the trial. At best, the evidence most favorable to the prosecution would show that appellant accosted Miss McGhee and struggled with her for fifteen minutes, that in the course of that struggle Miss McGhee's purse allegedly containing $21.00 was tossed about, and that when she recovered it, the $21.00 was missing. The record further shows that the appellant is a man weighing 196 lbs. (Tr. 92) and that Miss McGhee, who is smaller than average, weighs about 110 lbs. (Tr. 32) It is preposterous to conceive of any circumstances where a man

of appellant's weight would require fifteen minutes to subdue a woman nearly half his size in order to gain possession of her purse.

It is vitally significant that at no time did Miss McGhee testify that appellant either demanded her money or promised to leave her alone if she gave him her pocketbook. Indeed, Miss McGhee testified that the appellant did not take her pocketbook, and that after she freed herself from his grasp he walked rather than ran away. The assailant's words before and during the struggle may have indicated desire, but not for money. Miss McGhee testified that before he attacked her, appellant said "Hey girl, come here", and that he kept repeating these words and no others. When Miss McGhee finally freed herself from her assailant, he continued urging her to "come on".

These are neither the actions nor the words of a man attempting to commit robbery, and they were not so construed by any of the witnesses to the struggle, including the victim herself. Significantly, the neighbors testified that they hesitated to intervene because they believed Miss McGhee was fighting with her boyfriend. In her quest for help, Miss McGhee identified her assailant

not as a robber but rather as the man who attacked her. The radio call which reached Officer Adams was for assault, not robbery.

The only evidence on the record of the appellant's intent to commit robbery was Miss McGhee's uncorroborated testimony that the $21.00 her purse allegedly contained (and with which she was to repay a loan that evening) was missing. No money was found on the appellant or, apparently, anywhere in the one block area that appellant traversed before he was apprehended. In fact, the only "evidence" of appellant's intent to commit robbery was the erroneous summation of the facts presented to the jury by counsel for the Government in his closing argument. Thus the prosecution recited:

> "Miss McGhee came to Fourteenth and Perry and as she testified she said, that's the man, that's the man that tried to rob me." (Tr. 111)
>
> In fact, Miss McGhee testified:
>
> "After Eddie stopped the man I said, that's the man, that's the man." (Tr. 67)
>
> The prosecution's counsel stated:
>
> "And Officer Adams was also there when the complaining witness, Miss McGhee, identified the Defendant as the man who robbed her." (Tr. 112)
>
> In fact, Officer Adams testified that he responded

to a call "for holding one for arrest". (Tr. 24)

The prosecution's counsel stated:

> "She [Miss McGhee] stated today that this is the man who attempted to rob her." (Tr. 112)

In fact, Miss McGhee testified:

> "Q And you have no recollection or memory of any effort on his part to take the pocketbook?
>
> "A I can't say that he didn't take it. Because he always had the arm in which my purse was being in." (Tr. 72)

The prosecution's counsel stated:

> "They [the other witnesses] told you this Defendant was the man who assaulted Miss McGhee with the intent to rob her." (Tr. 128)

In fact, no witness testified that the defendant tried to rob Miss McGhee. Eddie Wells testified as follows:

> "Q And did you keep him there? Did you keep him at that location?
>
> "A Well, yes, I kept him there. When McGhee, Letitia McGhee said he attacked her." (Tr. 37)

Appellant submits that under no theory of the law does the prosecution's summation constitute the evidence of the case and it should not, in this case, be substituted for a record devoid of any evidence of appellant's

intention to commit robbery.

In any criminal case it is the burden of the prosecution to prove that the crime charged has actually been committed and that the accused has committed it. With respect to the extent of that burden, the test is whether there is substantial evidence which, taken in the light most favorable to the Government, tends to show that the accused is guilty beyond a reasonable doubt. United States v. Quarles, 387 F. 2d 551 (C.A. 4) Accord: Thomas v. United States, 369 F. 2d 372.

Not even the evidence most favorable to the prosecution in this case supports the charge that appellant assaulted Miss McGhee with the intent to rob her. At most it demonstrates that he assaulted Miss McGhee, but assault is not the crime for which appellant was tried and convicted. Had appellant been adjudged guilty of assault, the maximum sentence he might have received is one year's imprisonment and a $500.00 fine, rather than the thre[redacted] nine year term he is presently serving. (§22-504 D. C. Code) Appellant therefore urges that his conviction be reversed because there is no evidence sufficient to support that conviction.

B. THE COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF SIMPLE ASSAULT WHERE APPELLANT WAS INDICTED FOR ASSAULT WITH INTENT TO COMMIT ROBBERY.

At the close of the evidence and argument of counsel, the court charged the jury in accordance with the indictment of assault with intent to commit robbery. The court denied appellant's request for a charge of simple assault, stating that to instruct on the lesser crime at the close of the charge would place undue emphasis on the additional instruction and might prompt the jury to reach a compromise verdict.

Appellant submits that the court's failure to charge on the lesser included offense of simple assault constitutes reversible error. A defendant is always entitled to an instruction on any issue fairly raised by the evidence whether or not it is consistent with his testimony or the trial theory of the defense. Belton v. United States, 382 F. 2d 150, 155 (C.A.D.C.) 127 U.S. App.D.C. 201. By the same token, a defendant is entitled to instructions on a lesser included crime where there is evidence on the record to support a finding of guilt on that offense, for Rule 31(c) of the Federal Rules of

Criminal Procedure provides that:

> "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." (Emphasis supplied.) Title 18 U.S.C. Rule 31(c).

Where, as here, the offense of which the appellant was accused and convicted contained a lesser offense within the purview of Rule 31(c), the court's failure to instruct on that lesser included offense constitutes reversible error. Belton v. United States, supra. Accord: Sansone v. United States, 380 U.S. 343, 350; Berra v. United States, 351 U.S. 131, 134; Stevenson v. United States, 162 U.S. 313; Young v. United States, 309 F. 2d 662, 114 U.S. App.D.C. 42.

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Appellant contends that the facts in this case are similar to and controlled by Young v. United States, 309 F. 2d 662, 114 U.S.App.D.C. 42, where in a trial for assault with intent to commit robbery, this court found that failure to charge on simple assault in the face of contradictory testimony constituted reversible error.

The court noted that Young, denying that he assaulted the victim intending to rob him, testified instead that he was searching the victim's pockets in an effort to dis-

States, 351 U.S. 131, 134; Stevenson v. United States, 162

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close weapons he believed were concealed there because of a prior aggravated encounter between the two men. The court held that despite the improbable explanation defendant offered for his conduct, the trial judge "cannot withdraw the appraisal of credibility from the jury." Young v. United States, 309 F. 2d 662, 663.

CONCLUSION

For the reasons stated above, appellant prays that his conviction be reversed.

Respectfully submitted,

MARK B. SANDGROUND, ESQ.
700 Colorado Building
Washington, D. C. 20005
Attorney for Appellant

Of Counsel:

Marsha E. Swiss
Jack C. Sando, Esq.
Amram, Hahn & Sundlun

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was personally served on David G. Bress, Esq., United States Attorney, United States Courthouse, Washington, D. C., Counsel for Appellee, this day of December, 1968.

_____

States, 351 U.S. 131, 134; Stevenson v. United States, 162

U.S. 313; Young v. United States, 309 F. 2d 662, 114 U.S. App.D.C. 42.

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JAMES E. SHARP,
Assistant United States Attorneys.

Cr. 193-68

INDEX

TABLE OF CASES

OTHER REFERENCES

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Is appellant foreclosed from seeking appellate review of the sufficiency of the Government's evidence to sustain his conviction by his failure at trial to move for judgment of acquittal? If not, was the evidence sufficient to support conviction for assault with intent to rob?

2. Did the trial court abuse its discretion in failing to instruct the jury on the lesser included offense of assault where request was withheld until after the close of instruction, where instruction at that late juncture would have unduly emphasized the issue, where instruction on the lesser included offense was not consistent with appellant's theory of the defense and where the Government's evidence was overwhelming.

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* This case has never been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,127

ERNEST LEE BRASWELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed 26 February, 1968, appellant was charged with assault with intent to commit robbery in violation of 22 D.C. Code § 501. The charged stemmed from an incident which took place at approximately 11:00 p.m. on January 9, 1968, at 1445 Parkwood Place, N.W., Washingtn, D.C. in which Miss Letitia McGhee was dragged from her front porch, assaulted and robbed of between twenty to twenty-five dollars. After trial before United States District Court Judge Gerhard A. Gesell sitting with a jury on April 22 and 23, 1968, appellant was found

guilty as charged. He was subsequently sentenced to a term of three to five years.

The relevant facts relating to the crime show that at approximately 11:00 p.m. on the evening of January 9, 1968, Miss Letitia McGhee noticed a man following her, shortly after she alighted from a bus at 14th and Parkwood Place N.W. (Tr. 62.) The man followed her to her apartment house at 1445 Parkwood Place and yelled out, "Hey girl, come here" as she was about to insert the key in the front door. After she failed to respond, the man—appellant—ran up onto the porch, yoked her about the neck and pulled her backwards from the porch, thrusting the arm in which she held her purse up behind her back. (Tr. 63, 68, 70.) He then dragged her into the street admonishing her to stop screaming or he would "cut [her] so and so throat". (Tr. 68.) She realized that he did not have a knife and resumed her screams. (Tr. 77.)

Hearing the screams, Mr. Willie Hicks, who was visiting his fiance, Shirley Belk, at her house directly across the street from Miss McGhee's apartment, went to the front door and witnessed a man he positively identified as appellant struggling with Miss McGhee and attempting to grab the arm in which she held her purse (Tr. 80, 82, 83). Both Miss Belk and Mr. Hicks witnessed the complainant eventually break loose from appellant and run to the porch where they were standing. (Tr. 82, 83.) Appellant followed Miss McGhee to the porch saying "Girl, come on, I'm tired of your B.S." Hicks asked him if he knew the complainant, but appellant made no reply and walked off around the corner on Oak Street (Tr. 66, 74, 82). Miss McGhee testified that after the struggle she noticed her purse laying out in the street and upon closer examination discovered that from twenty to twenty-five dollars was missing from it (money with which she intended to pay a bill that night) (Tr. 66, 75, 76).

Shortly after the struggle, Miss McGhee's sister, a cab driver, arrived on the scene and together they pursued appellant up 14th Street where they encountered a friend, Eddie Wells, and shouted for him to stop appellant (Tr. 67). Wells stopped appellant and waited for the police to

arrive (T. 37, 38). Officer Walter L. Adams, Jr., responding to a radio call "holding one for arrest", arrived at 14th and Perry Place one and one-half blocks from the scene of the incident, and saw Wells and appellant struggling with one another. He immediately placed appellant under arrest and searched him (Tr. 24, 25). No money was found in his search of the appellant. (Tr. 26.) Appellant denied that he had grabbed anyone or attempted to rob anyone (Tr. 30). Complainant identified appellant at the scene of the apprehension as the man who "had grabbed her and intended to rob her". (Tr. 29.)

At trial, appellant took the stand in his own behalf and denied any participation in the incident stating that on the night in question he had been at a night club and was on his way home when he was stopped by Wells and identified by the complainant as her assailant (Tr. 91, 92). On cross examination appellant admitted that he had been convicted of larceny in 1958 and burglary in 1961. (Tr. 95.) Two character witnesses testified that appellant's reputation for peace and good order was good (Tr. 98, 100).

After both sides had rested the court invited counsel to submit requests for special instructions. Defense counsel made but one request and that was with respect to the location of the night club to which appellant alluded in his testimony. (Tr. 105, 106.) After closing arguments by both sides and the formal charge to the jury, defense counsel, when asked if he had any objection to any aspect of the charge, stated "I think that there might be a place here for a charge on simple assault" (Tr. 140). After brief discussion, the court refused to give the charge stating that it should have been raised earlier and that "to raise it at this stage, after the charge is completed, I think is to give it altogether too much emphasis and results in seeking a compromise verdict by the jury, and I will not give a charge on the lesser offense." (Tr. 141.) The jury returned a verdict of guilty.

This appeal followed.

ARGUMENT

I. Appellant is foreclosed to seek review of the sufficiency of the Government's evidence to sustain his conviction by his failure at trial to move for judgment of acquittal. In any event, the record reflects sufficient evidence to support appellant's conviction.

(Tr. 63, 66, 68, 70, 72)

Appellant argues that the record is totally insufficient to support his conviction of assault with intent to commit robbery. Appellant apparently concedes the sufficiency of evidence to support a finding of assault, and questions only the sufficiency of evidence relative to appellant's intent to commit robbery.

An examination of the record reveals that no motion for judgment of acquittal was made at any stage of the trial. It is a well established rule that in the absence of such a motion an appellate court will not pass upon the sufficiency of the evidence. *Hughes* v. *United States*, 320 F.2d 459, *cert. denied*, 375 U.S. 966 (1963); *Sanchez* v. *United States*, 365 F.2d 237 (10th Cir. 1966). At best, only if the verdict is so unsupported by evidence that it is palpably wrong or a manifest miscarriage of justice may review of the sufficiency of the evidence, notwithstanding the lack of a motion for judgment of acquittal at trial, occur. *Matthews* v. *United States*, 394 F.2d 104 (9th Cir. 1968); *Maxfield* v. *United States*, 385 U.S. 830 (1966).

The Government submits that a review of the record amply justified the jury's finding of assault with intent to commit robbery. The complainant, Mis McGhee, testified that the appellant yoked her about the neck, grabbed the arm in which she held her purse and dragged her into the street(Tr. 63,68, 70); that during her struggle with the appellant, her arm and the purse were held up behind her back and out of her view (Tr. 72); that just prior to the incident her purse contained between twenty and twenty-five dollars with which she was to repay a loan on the evening of the incident (Tr. 66); that immediately after

the struggle she noticed her purse in the street and discovered the money missing (Tr. 66). Not only does this testimony discount any possibility of manifest injustice or palpable wrong required for appellate review in the absence of a motion for judgment of acquittal, it meets full well the standards for denial of a motion for judgment of acquittal properly lodged at trial. *Glasser* v. *United States*, 315 U.S. 60 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967). Assuming the truth of complainants testimony and giving the Government the benefit of all legitimate inferences to be drawn from her testimony, there was ample evidence upon which to find appellant by his assault to have intended to rob her and on which to base a verdict of guilty.

II. The trial judge did not abuse his discretion in refusing to instruct on simple assault.

(Tr. 123, 140-141)

Appellant contends that the trial judge committed reversible error in failing to charge that the jury might find appellant guilty of simple assault as a lesser offense necessarily included in the offense of assault with intent to rob. We disagree.

Appellant submitted to the court the alternative suggestion for an instruction on simple assault after the jury had been fully instructed and was about to retire:

> "I think that there might be a place here for a charge on simple assault. If they believe there was an assault and are not satisfied that it was for the motive of robbery, simple assault might be inclusive in their deliberation." (Tr. 140.)

The court refused to give the instruction stating:

> "What concerns me about it, counsel, is that had you raised that question with me, which I gave you full opportunity to do, so that it could have been made a

> formal and necessary part of the charge, that would have been one thing, but to raise it at this stage, after the charge is completed, I think is to give it altogether too much emphasis and results in seeking a compromise verdict by the jury, and I will not give a charge on the lesser offense." (Tr. 141.)

This ruling by the court was correct. Rule 30, Federal Rules of Criminal Procedure provides that "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties." The reason for this rule requiring instruction requests to be made prior to closing argument and prior to the court's formal charge is grounded both in the danger of error incident in the necessarily rapid consideration of an oral request at such a time, and on the possible undue impact of a separate charge devoted to a single fact or theory. *United States* v. *Kahaner*, 317 F.2d 459, 477 (2d Cir. 1967), *cert. denied*, 375 U.S. 836. For that reason, it has been held that requests for additional instructions made after the court's charge to the jury come too late and that refusal to give them is not abuse of its discretion. *United States* v. *Salas*, 387 F.2d 121 (2d Cir. 1967); *United States* v. *Strassman*, 241 F.2d 789 (2d Cir. 1952).

In the instant case, at the completion of all the testimony and after both sides had rested, the court asked each counsel to submit for review any special request for instructions. Defense counsel made no mention of any instruction on simple assault at that juncture, and the court prepared and delivered its instructions accordingly. It seems apparent, from a careful reading of the record, that trial defense counsel was in fact cautious to avoid an instruction on simple assault until the waning moments of the trial. It appeared his object throughout to leave the jury with but one alternative to finding appellant guilty of assault with intent to commit robbery and that was acquittal based upon mistaken identity. At no time did

he make a motion for judgment of acquittal to test the sufficiency of any element of the offense charged. In his closing remarks to the jury trial defense counsel was quick to urge the jury that they were "confined to the question as to whether this assault was to commit robbery." (Tr. 123.) Nevertheless, a few moments later, at the close of the two day trial, after the court's formal charge and final argument by both sides and just as the jury was about to be retired for deliberations, defense counsel sought to give the jury a third alternative disposition. And even here, defense counsel made no more than a tentative suggestion. Recognizing the tremendous impact of such an untimely and isolated charge in the circumstances below, the court properly and wisely refused it, sending the case to the jury on the original charge. In so doing, the court did not abuse its discretion.

The Government's evidence below was overwhelming, the complainant and several others documenting appellant's participation in the offense. Appellant cannot now speculate that in the face of this evidence and its belief by the jury, that the jury would have compromised on a lesser offense if given the opportunity.

Moreover, even if timely made, appellant's suggestion for a lesser included offense instruction might properly have been denied.

A defendant who wishes to have the benefit of a lesser included offense instruction pursuant to Rule 31(c) of the Federal Rules of Criminal Procedure must come forward with some evidence on the element required for the charged offense but not for the lesser included offense, when the Government has made out a compelling case, uncontroverted on the evidence of that issue. *Driscoll* v. *United States*, 356 F.2d 324 (8th Cir. 1967). The Government submits that there was not and that no factual dispute on the question of intent exists.

Complainant's testimony went to the jury unimpeached and uncontested on any issue save identity. No other version of the incident exists. Appellant took the stand and denied any participation in the attack stating that he was

in a night club not far from complainant's home on the night of the incident and was mistakenly identified as the attacker. At no time did appellant come forward with any evidence to contradict the complainant's testimony bearing on the intent of her assailant, as did the defendant in *Young* v. *United States*, 309 F.2d 662, 114 U.S. App. D.C. 42, which appellant cites as controlling. (Appellant's Brief, p. 12). Young, on trial for assault with intent to commit robbery, was held to have been improperly denied a requested instruction on simple assault in view of the fact that he took the stand and admitted that he went through the victim's pockets but explained that it was only to search him for weapons and with no design to rob him. The court held that, regardless of the improbability of Young's story, it sufficiently contradicted the Government's evidence of intent to require an instruction on Young's theory, that if he was guilty of anything, it was simple assault.

Appellant also relies on *Belton* v. *United States*, 382 F.2d 150, 155, 127 U.S. App. D.C. 201 as support for his contention that failure to give the instruction was reversible error. In Belton, the defendant, charged with murder, contended throughout the trial that he was not present when the fatal shots were fired, yet requested an instruction on manslaughter. In denying the request the court held that if believed by the jury, his story could only have lead to acquittal and found no evidence "fairly tending" to bear on manslaughter. In the instant case, appellant also denies his presence at the time of the crime.

Driscoll and *Belton* indicate that even if timely made, appellant's suggestion for a lesser included offense instruction could properly have been denied. The issue below was clearly drawn between the complainant's allegations and appellant's alibi. No version in the middle existed.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JAMES E. SHARP,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 332291 470

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Appellee	:	

ON PETITION FOR APPEAL
REPLY BRIEF FOR APPELLANT ERNEST LEE BRASWELL

MARK B. SANDGROUND, ESQ.

JACK C. SANDO, ESQ.
MARSHA E. SWISS

AMRAM, HAHN & SUNDLUN
Of Counsel

TABLE OF ADDITIONAL CASES

REPLY BRIEF FOR APPELLANT
ERNEST LEE BRASWELL

Our main brief treats almost all the points made by the Government in its brief and therefore only the following questions warrant a brief reply.

1. Does complaining witness' statement as to the defendant's intent in assaulting her constitute evidence sufficient to sustain a conviction of assault with intent to commit robbery?

In its statement of facts the Government relies almost entirely upon Police Officer Adams who testified that "to the best of my recollection", when he arrived at the scene of the arrest the complaining witness, Miss Letitia McGhee, identified appellant as the man who "had grabbed her and intended to rob her". (Tr. 29) It is significant that Miss McGhee failed to corroborate this recollection and testified that she had said only "that's the man, that's the man". (Tr. 67)

In any case, testimony of this nature, although not hearsay because allegedly uttered in appellant's presence, is nonetheless insufficient to support his conviction. The state of appellant's mind and his intent at the time of the alleged attack is a matter to be determined by the jury. No complaining witness can offer testimony in the form of a legal conclusion as to her assailant's intent, nor can a jury

validly base its findings solely upon such testimony. The general rule is that the opinion of a witness is not admissible to interpret the meaning of the acts, conduct or language of another. Witty v. State, 203 S.W. 2d 212, 220 (Tex., 1947); Grimes v. State, 365 F. 2d 739, 745 (Okla., 1961). Courts have in fact reversed convictions for rape predicated upon the complaining witness' testimony that the defendant was trying to rape her, deeming such testimony to be clearly a conclusion of the witness. Dean v. State, 95 So. 323 (Ala., 1923); Stewart v. State, 172 So. 675 (Ala., 1937).

Where the only evidence of appellant's intent to commit robbery was the reported testimony of the complaining witness to the police officer, his conviction must be reversed. No conviction may be sustained upon mere speculation or suspicion of guilt. United States v. Solice, 332 F. 2d 626 (C.A. 4, 1964); United States v. Grow, 384 F. 2d 132 (C.A. 4, 1968). The law requires evidence sufficient to permit a jury to find an accused guilty beyond a reasonable doubt. United States v. Heithaus, 391 F. 2d 310 (C.A. 3, 1968). The record of this case clearly reveals the Government's failure to meet the necessary standard of proof.

2. Does the Trial Court's refusal to charge on a lesser included offense, as requested before the jury retires, constitute a basic and prejudicial error requiring a reversal of appellant's conviction?

The Government asserts that because of appellant's failure to make a request, prior to the Court's charge, for an instruction on the lesser included offense of simple assault, the Court did not abuse its discretion in refusing to give the charge. The Government is manifestly in error. Rule 30 of the Federal Rules of Criminal Procedure states in relevant part,

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Appellant indicated his objection in this case well before the jury retired. The Court refused to give the charge because of its belief that a charge on the lesser included offense might encourage the jury to reach a compromise verdict.

Where the Court's failure to give a requested instruction, albeit belatedly, constitutes a basic and prejudicial error, the law requires reversal of a conviction. United States v. Levy, 153 F. 2d 995, 998 (C.A. 3, 1946);

United States v. Gordon, 242 F. 2d 122 (C.A. 3, 1957); Esters v. United States, 260 F. 2d 393 (C.A. 8, 1958). Under the circumstances of this case, the record is so lacking in any evidence whatsoever to support a verdict of assault with intent to commit robbery that a basic and prejudicial error has occurred by virtue of the Court's failure to charge on the lesser included offense.

As noted in appellant's main brief, the maximum sentence for simple assault is 1 year's imprisonment and $500 fine, while appellant here was sentenced to a term of three to nine years.

Appellant therefore respectfully requests this Court to reverse the conviction below.

Respectfully submitted:

MARK B. SANDGROUND, ESQ.
700 Colorado Building
Washington, D.C. 20005
Attorney for Appellant

Of Counsel:

Marsha E. Swiss
Jack C. Sando, Esq.
Amram, Hahn & Sundlun

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief for Appellant was personally served on David G. Bress, Esq., United States Attorney, United States Courthouse, Washington, D.C. 20001, Counsel for Appellee, this day of February, 1969.

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